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BY CONSTITUTIONAL LAW GROUP | DECEMBER 2, 2013 · 11:32 AM

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Stephen Tierney: The Scottish Constitution After Independence



According to the Scottish Government White Paper issued this week, [Scotland's Future](#), an independent Scotland will have a new written constitution (this repeats the commitment contained in the Scottish Government's earlier [White Paper](#) of March). The intention is to replace Westminster parliamentary supremacy with the 'sovereignty of the people of Scotland' since, the

Government claims, popular sovereignty has historically been 'the central principle in the Scottish constitutional tradition.' While this latter claim may be [questionable](#), the commitment to a written constitution does promise a significant constitutional break with the Westminster tradition and a new constitutional culture for Scotland.

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In this blog I will briefly discuss three matters:

- When will the proposed constitution be drafted and promulgated?
- What will it contain?
- How will it be drafted?

When will Scotland have a new constitution?: The short answer is, we don't know exactly. The task of drafting a new constitution will not commence until after the Scottish Parliament elections scheduled for 5 May 2016, some six weeks after Independence Day, set for 24 March. The White Paper does not offer a view as to how long the drafting process is likely to take and therefore we have no provisional date for the eventual promulgation of a new constitution.

What will it contain?: There is something of a tension between the substantive constitutional proposals put forward in the White Paper and the process by which it will be drafted.

The Scottish Government offers a fairly extensive list of what it thinks the constitution should contain, and a number of these provisions are key to its vision for independence. For example:

- equality of opportunity and entitlement to live free of discrimination and prejudice
- entitlement to public services and to a standard of living that, as a minimum, secures dignity and self-respect and provides the opportunity for people to realise their full potential both as individuals and as members of wider society
- protection of the environment and the sustainable use of Scotland's natural resources to embed Scotland's commitment to sustainable development and tackling climate change
- a ban on nuclear weapons being based in Scotland
- controls on the use of military force and a role for an independent Scottish Parliament in approving and monitoring its use
- the existence and status of local government
- rights in relation to healthcare, welfare and pensions
- children's rights
- rights concerning other social and economic matters, such as the right to education and a Youth Guarantee on employment, education or training

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- [July 2013](#)
- [June 2013](#)
- [May 2013](#)
- [April 2013](#)
- [March 2013](#)
- [February 2013](#)
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- [December 2012](#)
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Another proposal is that Scotland would remain a constitutional monarchy ‘for as long as the people of Scotland wish us to be so’. In relation to a number of these proposed rights, such as the opportunity of education, training or employment and rights to welfare support and health care, there is no commitment that these would be legally enforceable by courts but rather the more vague suggestion that they will be ‘questions of social justice at the forefront of the work of Scotland’s Parliament, government and public institutions.’

But in any case, since the Government does not propose to draft the constitution itself, each of these is merely a proposal for consideration. As we turn to the proposed process by which the constitution will be drafted we find that there is no guarantee that any of these commitments will in fact find their way into a new constitution.

Drafting the Constitution: A Scottish Constitutional Convention?

The White Paper provides that, following the elections of May 2016, a constitutional convention will be established to ‘prepare the written constitution’. But how can it be so sure? There is no guarantee the SNP will win the 2016 elections and another party or parties forming the government at that time may have different views about this.

The Scottish Government seeks to deal with this by way of some form of constitutional guarantee or entrenchment: ‘The constitutional platform, along with the refreshed Scotland Act, will be the founding legislation of an independent Scotland and will not be subject to significant alteration pending the preparation of a permanent constitution by the constitutional convention’. It is stated in the White Paper that, during the transitional stage between the referendum and Independence Day on 24 March, legislation will be passed placing a duty on the Scottish Parliament elected in 2016 to establish a constitutional convention. It is not clear by whom this legislation will be passed although it does seem that the goal is either for concurrent legislation of the UK and Scottish Parliaments or for the Westminster Parliament to transfer power to the Scottish Parliament for this purpose. Even so, this raises an interesting question as to whether the 2016 Parliament would be bound by such legislation. There would of course be no written constitution in place to restrict its powers. Would it be bound by the sovereignty of Westminster? Surely not, as the newly elected Parliament of an independent country. This issue is worthy of more detailed consideration in due course and important lessons may well be found from [comparative cases](#).

Assuming that the Scottish Parliament does assume the role as convener of a

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constitutional convention in 2016, what will this convention look like?

Perhaps not surprisingly at this stage the White Paper offers little in the way of detail. But all the same important questions remain to be asked. We are told that the convention will be 'open, participative and inclusive' and that the new constitution 'should be designed by the people of Scotland, for the people of Scotland'. But is the proposed convention likely to be a genuinely popular process?

In one passage the White Paper states: 'International best practice and the practical experience of other countries and territories should be considered and taken into account in advance of the determination of the process for the constitutional convention. In the last decade, citizen-led assemblies and constitutional conventions have been convened in British Columbia (2004), the Netherlands (2006), Ontario (2007) and Iceland (2010). Since 2012, Ireland has been holding a citizen-led constitutional convention to review various constitutional issues.' From a number of these examples it is clear that citizens can be engaged directly and in meaningful ways in drafting important constitutional provisions. But is this what the White Paper proposes? In fact this passage is juxtaposed with the suggestion that the constitutional convention 'will ensure a participative and inclusive process where the people of Scotland, as well as politicians, civic society organisations, business interests, trade unions, local authorities and others, will have a direct role in shaping the constitution.'

This raises the question: will the process really be a popular and meaningful engagement with citizens, or will it be a largely elite-led event, like the Scottish Constitutional Convention from 1989-1995? Will in fact the new constitution be drafted by elites – politicians, civic society organisations, business interests, trade unions and local authorities? If so, is this satisfactory? After all, of these groups only politicians are elected by the citizens of Scotland. To whom are the other organisations accountable and in what ways? Who would select members of these groups to sit on the convention, on what basis, and with what degree of decision-making power would they be vested? The reference to 'civic society organisations' introduces a risk that pressure groups with fixed agendas and well-oiled activism machinery could hijack the process, arguing persuasively for the entrenchment in the new constitution of their own particular priorities, priorities which may not have the support of a plurality of citizens.

Such an approach to constitutional drafting runs counter to some of the other examples cited in the White Paper. The Citizens' Assemblies in British Columbia and Ontario, for example, were composed of citizens selected randomly from the electoral role. This was a direct attempt to take

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constitutional decision-making out of the hands of elites, be they politicians or members of the fabled 'civil society'.

Another question is: what power will such a convention, whether popular or elite, have? The White Paper says it will 'prepare' the constitution. Does that mean it will have the authority to present a final version of the constitution for ratification? Or would its role be advisory only, subject to change by the Scottish Parliament?

It seems that the convention is intended to have real determining power. That the Scottish Government can only 'propose [certain matters] for consideration' by the constitutional convention suggests that the convention will have control over the inclusion or exclusion of all of the Government's goals outlined above, including the personality of the head of state. However, there seems to be one exception here. According to the White Paper the convention will itself be limited in its remit by at least one substantive precondition: 'Key equality and human rights principles, including the requirements of the European Convention on Human Rights (ECHR), would be embedded in the written constitution.' This seems to be a non-negotiable commitment which the convention could not override. In other words, the convention will not be able to give effect to the ECHR in a way comparable to sections 3 and 4 of the Human Rights Act 1998, leaving the last word to the Scottish Parliament, a power which Westminster currently enjoys. There is also the suggestion that legislation during the transition period will give the ECHR the same legal force for reserved matters as it already has for devolved matters. Both these transitional arrangements and the constitutional pre-commitment on the ECHR in turn make the supremacy of judges over the new Scottish Parliament in the human rights area another de facto pre-commitment. Of course it may be that a constitutional convention or citizens' assembly would come to the view that this is good for Scotland, but surely that should be left to this process to determine?

Finally, how would the constitution be promulgated? Would it simply need the ratification of the Scottish Parliament, or would there be a referendum? The White Paper does not say, but given the growth in referendums within our constitutional practice it seems inconceivable that such a momentous constitutional development, intended to declare the sovereignty of the Scottish people, could take place without the express authorship of the people expressed in a referendum.

Stephen Tierney is Professor of Constitutional Theory at the University of Edinburgh and Director of the Edinburgh Centre for Constitutional Law.

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He is currently ESRC Senior Research Fellow under the [Future of the UK and Scotland programme](#). I am grateful to Katie Boyle for research assistance in writing this blog.

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4 responses to “*Stephen Tierney: The Scottish Constitution After Independence*”

Constitutional Law Group

December 2, 2013 at 11:50 am



This is an important and powerful post from Stephen. The question of a second referendum has not been properly considered by the Scottish Government. As Stephen argues, a referendum on a new constitution is

now common practice in many territories. It would be surprising if such a vote were not held in Scotland. It might also be worth remembering that there was a suggestion that a referendum should also be held on the result of the negotiations between the UK and Scottish representatives over the terms of independence. Furthermore, Neil Walker – in a seminar run by the Scottish Constitutional Futures Forum – has also noted that it is common for new states seeking accession to the EU to hold a referendum on that, too.

So we have three issues, closely tied together, each of which suggest a second referendum might be a good idea. Could it be argued that these should be combined? Having voted yes to independence, perhaps following negotiations with the UK, the EU, and the drafting of a new constitution, a second referendum should be held to establish the constitutional base of a new Scottish state?

Nick Barber

[Reply](#)

John Lubran

December 3, 2013 at 5:52 pm



There continues to be a commonly held belief, amongst ‘professional’ commentators, in constitutional law fictions. The academic fraternity are mired in these baseless conditioned reflexes. It seems that to obtain a PhD in constitutional law one must first leave common sense and common law outside of the false premise on which most such academic argument rely.

There are some fundamental realities about constitutions and the first is that any constitution simply drawn up by politicians and powerful elites and ratified by a show of hands in their parliament is not a constitutional instrument; they are mere statutes. The only way to create a constitutional instrument is through a very clear, fully informed and overwhelming consensus of the population affected; it’s a very big job, it can’t be rushed, it will take a very long time. The one it proposes to overthrow has taken centuries to form. This is not Egypt.

Creating a new constitution in an advanced liberal democracy such as Scotland (the term liberal in this context having nothing to do with any liberal party), is a very big task. But let us first consider the fact that Scotland already has its own constitution in the same way that England has its own too. Certainly written if not codified into a single handy

document. Scotland is one of that special group of countries whose constitutional law is based on common law, the ‘little parliaments’ of juries and higher court precedents on the one hand and contractual constitutional instruments on the other, all under the sovereignty of a Constitutional Monarch as opposed to the legal fiction of the sovereignty of politicians, who by their very power hungry nature would love nothing more than to have Napoleons civil code supreme on these islands. As things stand, throughout Britain, politicians cannot make laws, which is the fundamental myth subscribed to by too many academics. Politicians make statute legislation that must follow law to have any legitimacy. This is not arcane, though it does appear to be hidden in plain sight. Politicians and their familiars have been trying to usurp the supremacy of common law and constitution since the perversely unconstitutional 1911 Parliament Act. Astonishingly there is nothing in law that enables them to do this; it has been achieved by the cap doffing ignorant acquiescence of earlier populations. It simply won't do today because there will be unchallengeable opposition to allowing mere politicians to decide on any constitutional agreements without a full and inclusive consultation of a sort almost never undertaken by them even though they often erroneously describe their processes as such.

The list of provisions ‘offered’ by the Scottish Parliament in Stephens article are typical of weasel worded snake oil salesmen, of course these basic provisions for decency must be provided, but who the heck do they think they are? Nothing in these so called ‘offered’ provisions is not already properly provided for in Scotland's exiting constitutional law. The deceit of this ‘offer’ is that by creating this so called new constitution authority will be shifted from common law to politicians. It may merely look like shallow and naive politicians overstepping themselves but conspiracy theorists will have a field day pointing out its more sinister aspects.

Scotland is not a banana republic. High handedness by political cartels and their apologists in academia who seeks to transfer sovereignty from Law to hastily drawn up statutes will only end in tears.

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